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SERVICE DATE - OCTOBER 23, 1997

SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 40837

RHINELANDER PAPER COMPANY
v.
THE BANKRUPTCY ESTATE OF MURPHY MOTOR FREIGHT LINES, INC.

Decided: October 20, 1997

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our finding under section 2(e) of the NRA, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court, District of Minnesota, Third Division, in *Murphy Motor Freight Lines, Inc., v. Rhinelander Paper Co., Inc.*, BKY 3-87-577 and ADV. 3-89-87. The court proceeding was instituted by Murphy Motor Freight Lines, Inc. (Murphy or defendant), a former motor common and contract carrier, to collect undercharges from Rhinelander Paper Company (Rhinelander or complainant). Murphy seeks to collect undercharges in the amount of $14,729.66 allegedly due, in addition to amounts previously paid, for services rendered in transporting 30 shipments of wrapping paper between March 2, 1984, and February 5, 1987. The shipments were transported from Rhinelander, WI, to Burlington, NC, Kansas City, MO, Omaha, NE, and Chicago, IL. By order dated April 2, 1991, the court stayed the proceeding and referred all tariff rate issues, particularly the issue of rate reasonableness, to the ICC for determination.

Pursuant to the court order, Rhinelander, by complaint filed on July 10, 1992, requested the ICC to resolve issues of tariff applicability and rate reasonableness. By decision served September 23, 1992, the ICC established a procedural schedule.[2] On November 25, 1992, complainant submitted its opening statement. Defendant failed to submit a reply and indeed has failed to make an appearance or otherwise participate in any aspect of this proceeding.

Complainant asserts that the class rates that defendant here seeks to assess are unreasonable; that the charges originally assessed for those shipments transported to Burlington, NC, between March 3, 1984, and August 13, 1984, were properly assessed in accordance with tariff MFRY 405A, Item 2900; that changes in published tariffs not disclosed to complainant and not reflected in post-change carrier invoices are invalid; and that the charges that defendant now seeks to assess fail to consider published discount tariffs applicable to the subject shipments. Attached as Appendix 1 to complainant's submission is a list of the subject undercharge claims that includes the original bill date, the freight bill number, and the asserted balance due amount. Complainant divides the 30

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] On January 28, 1993, the ICC vacated the September 23, 1992 procedural schedule for defendant's benefit and recommenced the proceeding. A new procedural schedule was established by decision served March 8, 1993.

undercharge claims into four categories consisting of: 9 shipments transported to Burlington between August 31, 1984, and December 20, 1984 (Group 1); 12 shipments transported to Burlington between March 3, 1984, and August 13, 1984 (Group 2); 3 shipments transported to Kansas City or Omaha (Group 3); and 6 shipments transported to Chicago (Group 4).

Rhinelander supports its arguments with an affidavit from Marian Joslin, complainant's Traffic Supervisor in 1984 and 1985. Ms. Joslin asserts that she worked with Mr. Joe Bianco, manager of the Murphy terminal located near Rhinelander, and Mr. Ron Pitek, sales representative for Murphy, to establish the rates and charges to be assessed for the subject movements. According to Ms. Joslin, Mr. Pitek was advised that, to attract Rhinelander's traffic, Murphy would have to offer rates competitive with those of other carriers. She states that, prior to August 1994, the rate quoted by Murphy for Rhinelander movements to Burlington was $3.30 per hundred pounds (cwt.) and that the rate was subsequently increased to $3.42 per cwt. Ms. Joslin maintains that Rhinelander tendered its traffic to Murphy based on assurances from Murphy that the quoted rates were applicable,[3] that Rhinelander received invoices from Murphy containing freight charges that were in conformity with the quoted rates, that Rhinelander paid the invoiced charges, and that Rhinelander's payments were accepted by Murphy without question.

Attached to Ms. Joslin's affidavit within Exhibits A, B, and C are copies of balance due bills issued by defendant for 24 of the subject shipments. These balance due bills reflect original freight bill data as well as "corrected" balance due amounts. Exhibit A contains copies of the balance due bills issued for all 21 of the subject shipments to Burlington. These balance due bills indicate that charges for shipments transported prior to August 24, 1984, originally assessed at $3.30 per cwt., were re-rated by defendant to $3.42 per cwt. (12 shipments); that charges for shipments transported between August 31, 1984, and October 31, 1984, originally assessed at $3.42 per cwt., were re-rated by defendant to $6.71 per cwt. (5 shipments); and that charges for shipments transported between December 6, 1984, and December 20, 1984, originally assessed at $3.30 or $3.38 per cwt., were re-rated by defendant to $6.71 per cwt. Exhibits B and C contain three balance due bills representative of shipments destined to Kansas City, Omaha, and Chicago. These balance due bills indicate that the originally assessed rate of $2.63 per cwt. for the Kansas City shipment was re-rated to $3.32 per cwt.; that the originally assessed rate of $4.45 per cwt. for the Omaha shipment was re-rated to $5.47 per cwt.; and that the originally assessed rate of $1.08 per cwt. for the Chicago shipment was re-rated to $1.27 per cwt.

By decision of September 3, 1993, the ICC reopened the proceeding and, in recognition of its newly adopted standards for rate reasonableness announced in *Georgia-Pacific Corp.-- Pet. For Declar. Order*, 9 I.C.C.2d 103 (1992), *reconsidered* 9 I.C.C.2d (1993), extended an opportunity to the parties to supplement the record with respect to the rate reasonableness issue. By letter filed September 23, 1993, the complainant responded that it was not necessary to supplement the record because it had already submitted testimony and evidence bearing on the issue of rate reasonableness.

On December 3, 1993, the NRA became law. The NRA substantially restored the ability of the ICC (and now the Board) to find that the assessment of undercharges is an unreasonable practice, and it provided several new grounds on which shippers may defend against the payment of undercharges.[4] By decision served December 23, 1993, the ICC reopened the record and established a procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA and to submit new evidence and argument in light of the new law. By letter filed March 29, 1994, complainant acknowledged the enactment of the NRA and indicated that the present record was sufficient to resolve this proceeding.

DISCUSSION AND CONCLUSIONS

[3] Attached as Exhibit E to Ms. Joslin's affidavit is a letter from Mr. Pitek, dated July 24, 1987, in which he states that "Burlington, NC was quoted as $3.30 on 42m. There is no date on the rates, but I presume it must have been about 1984 or 1985 that I sent this to St. Paul."

[4] The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in *Maislin Indus. v. Primary Steel*, 497 U.S. 116 (1990).

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.[5]

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[6]

It is undisputed that Murphy is no longer an operating carrier.[7] Accordingly, we may proceed to determine whether defendant's attempt to collect undercharges (the difference between the applicable filed tariff rate and the rate originally collected) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, complainant has submitted representative balance due bills indicating that the rates originally assessed by defendant were consistently below those that defendant is here seeking to assess and were in conformity with rates agreed to by the parties. We find this evidence, which is confirmed by Mr. Pitek's letter, sufficient to satisfy the written evidence requirement of section 2(e). *E.A. Miller, Inc.-- Rates and Practices of Best,* 10 I.C.C.2d 235 (1994) (E.A. Miller). *See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.,* C.A. No. 89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the rates originally billed by the carrier and paid by Rhinelander were rates agreed to in negotiations between the parties. The balance due freight bills confirm the unrefuted testimony of Ms. Joslin and reflect the existence of a negotiated rate.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a

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[5] We recognize that the court referred this case to the ICC for consideration of rate reasonableness and other tariff rate issues. Nevertheless, our use of section 2(e)'s "unreasonable practice" provisions to resolve these matters is fully appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by the court or raised by the parties. Rather, we may instead decide cases on other grounds within our jurisdiction, and, in cases where section 2(e) provides a dispositive resolution, we rely on it rather than the more subjective rate reasonableness and tariff rate provisions. *See Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee of the Bankruptcy Estate of Total Transportation, Inc.*, No. 40640 (ICC served Feb. 7, 1995).

[6] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

[7] Murphy held both common and contract carrier operating authority issued by the ICC under various subnumbers of No. MC-108937. All of Murphy's operating authorities were revoked on December 7, 1987.

tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that a negotiated rate was offered to Rhinelander by Murphy; that Rhinelander, reasonably relying on the offered rate, tendered the subject traffic to Murphy; that the negotiated rate was billed and collected by Murphy; and that Murphy now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Murphy to attempt to collect undercharges from Rhinelander for transporting the shipments at issue in this proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on the service date.

3. A copy of this decision will be mailed to:

The Honorable Dennis D. O'Brien
United States Bankruptcy Court for the
District of Minnesota, Third Division
627 Federal Building
St. Paul, MN 55101

Re: Case No. BKY-3-87-577
ADV-3-89-87

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary